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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 896

NONLES FARNACHER, DEVET PARNACHER, NANNIE PARNACHER, now JOHNSON, and SALINA SCOTT,
Petitioners,

VERSUS

HOUSTON B. MOUNT, Executor of the Estate of Liesiny Walton, Deceased,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

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Ada, Oklahoma.

April, 1957.

UTTERBACK TYPESETTING CO., 13 SO. WALKER, OKLAHOMA CITY, PH. FO 2-8750

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Exhibit "A":

Opinion of the Supreme Court of the State of Oklahoma in Parnacher et al. v. Mount, No. 37026 ..... i-v

Exhibit "B":

Opinion of the Supreme Court of the State of Oklahoma in Parnacher et al. v. Mount, No. 34531 ..... v-xvii

In the
Supreme Court of the United States
OCTOBER TERM, 1956

No. .....

NONLES PARNACHER, DEVET PARNACHER, NANNIE PARNACHER, now JOHNSON, and SALINA SCOTT,
Petitioners,

VERSUS

HOUSTON B. MOUNT, Executor of the Estate of Liesiny Walton, Deceased,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

Petitioners, Nonles Parnacher, Devet Parnacher, Nannie Parnacher, now Johnson, and Salina Scott, pray that this Court grant certiorari to review the decision of the Supreme Court of the State of Oklahoma, in case numbered 37026, wherein petitioners were plaintiffs in error and the respondent, Houston B. Mount, executor of the estate of Liesiny Walton, deceased, was defendant in error.

REPORT OF OPINION DELIVERED BELOW

This petition is to obtain a review of the decision of the Supreme Court of Oklahoma rendered on November 20, 1956, in case numbered 27026 in that court, entitled *Nonles*

Parnacher, Devet Parnacher, Nannie Parnacher, now Johnson, and Salina Scott, Plaintiffs in Error v. *Houston B. Mount, Executor of the Estate of Liesiny Walton, Deceased, Defendant in Error,* and the decision of the Supreme Court of Oklahoma, made on January 8, 1957, denying petitioners' petition for rehearing in that court (R. 302), which petition for rehearing had been filed within the time allowed by the rules of that court (R. 298). (References to R. — or C-M. — refer to pages of the typewritten record, certified by the Clerk of the Supreme Court of Oklahoma, and filed herewith.)

The opinion of the Supreme Court of Oklahoma is reported in 306 Pacific Reporter, 2nd Series, at page 302. The opinion appears in the typewritten certified transcript of record filed herewith (R. 290), and a copy of such opinion is included in the appendix to this petition as Exhibit "A". On January 28, 1957, the Supreme Court of Oklahoma made an order staying the enforcement of its mandate until April 10, 1957, pending the filing of this petition in this Court (R. 307).

A copy of the opinion of the Supreme Court of Oklahoma on the former appeal (*Parnacher et al.* v. *Mount,* 207 Okla. 275, 248 P.2d 1021), is attached as part of the appendix hereto, and marked Exhibit "B."

GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

Within 15 days after the rendition of the opinion of the Supreme Court of Oklahoma, and on December 5, 1955, as permitted by the rules of the Supreme Court of

Oklahoma, allowing filing of petition for rehearing within 15 days after decision (Rules 28, 29, 33, following Section 987, Title 12, O.S.A., or O.S. 1951), petitioners filed petition for rehearing in the Supreme Court of Oklahoma (R. 298), which was denied on January 8, 1957 (R. 302). By subdivision c of Section 2101, U.S.C., writ of certiorari may be applied for in this Court within 90 days after the entry of the judgment or decree of the Supreme Court of Oklahoma. This petition for writ of certiorari may invoke the jurisdiction of this Court if filed in the Supreme Court of the United States within 90 days after the petition for rehearing in the Supreme Court of Oklahoma was denied on January 8, 1957. The 90-day period begins to run from the day such petition for rehearing was denied by the Supreme Court of Oklahoma. *Morse* v. *United States*, 270 U.S. 151, 70 L. Ed. 518, 46 Sup. Ct. 241; *Gypsy Oil Co.* v. *Escoe*, 275 U.S. 498, 72 L. Ed. 393, 48 Sup. Ct. 112.

The statutory provision which confers on this Court jurisdiction to review the judgment and decision of the Supreme Court of Oklahoma, rendered on November 20, 1956, and its judgment and decision of January 8, 1956, denying petitioners' petition for rehearing in that court, is believed to be that part of Section 1257 of Title 28, U.S.C., which provides that:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * * * * * * * *
>
> "(3) By writ of certiorari * * * where any title, right, privilege or immunity is specially set up or

claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

THE QUESTIONS PRESENTED FOR REVIEW

(1) Whether the act of a County Judge of the State of Oklahoma, in determining whether the will of a full-blood Indian of the Five Civilized Tribes in Oklahoma should be approved under Section 23 of the Act of Congress of April 26, 1906, 34 Stat. 145, as amended by Section 8 of the Act of Congress of May 27, 1908, 35 Stat. 315, is a judicial or quasi judicial act, involving the exercise of discretion, or only a ministerial act, and, whether, after such a will has been presented to one such officer for approval, he has exclusive jurisdiction to determine whether it should be approved, and, whether, after such a will has been presented to one such official for his action of approval, and he has, in the exercise of discretion, determined that it should not be approved, and has refused to approve it, the same will may thereafter be validly approved by another such officer or whether it may be taken from place to place and to different officers given authority by the statute to approve such a will until one is found who will approve it, and thereby made valid as to restricted property?

(2) Specifically, as to the preceding question, whether the County Judge of Garvin County, Oklahoma, had jurisdiction to approve the will involved in this case, after such same will had been presented to the County Judge of Pontotoc County, Oklahoma, when it had been executed,

for acknowledgment and approval, under said federal statute, and such County Judge of Pontotoc County, Oklahoma, had, in the proper exercise of the discretion and authority vested in him by said Act of Congress duly determined that said will should not be approved and had refused to approve it?

(3) Whether the trial court, in this case, erred in ruling out evidence offered to prove the facts included in the preceding questions, on the ground that a former decision of the Supreme Court of Oklahoma, was *res adjudicata* or the law of the case as to said matters?

(4) Whether petitioners are to be prevented from obtaining determination of the federal question presented by reason of application of a rule of *res adjudicata* as to any previous decision, or of the law of the case rule, under the facts and circumstances of this case?

STATUTES INVOLVED

Section 23 of the Act of Congress of April 26, 1906 (34 Stat. 137, 145), as amended by Section 8 of Act of Congress of May 27, 1908 (35 Stat. 312, 315), which provides, as follows, to-wit:

> "Every person of lawful age and sound mind may by last will and testament devise and bequeath all of his estate, real and personal, and all interest therein: Provided, that no will of a full-blood Indian devising real estate shall be valid if such last will and testament disinherits the parent, wife, spouse, or children of such full-blood Indian, unless acknowledged before and approved by a judge of the United States court

for the Indian Territory, or a United States Commissioner, or a judge of a county court of the State of Oklahoma."

STATEMENT OF THE CASE

The decision of which review is sought by this petition affirmed an order and judgment of the District Court of Pontotoc County, Oklahoma, affirming a decree of distribution of the County Court of Pontotoc County, Oklahoma, and order allowing final account of an executor in a probate proceeding. The petitioners are the heirs of the deceased, Liesiny McLean Walton, a full-blood Chickasaw Indian, Roll No. 777, deceased.

The petition in error (R. 1), which was filed in the Supreme Court of Oklahoma, stated in part:

> "The said Nonles Parnacher, Devet Parnacher, Nannie Parnacher, now Johnson, and Salina Scott, plaintiffs in error, complain of said defendant in error, Houston B. Mount, Executor of the Estate of Liesiny Walton, deceased, for that the said Houston B. Mount, executor of the estate of Liesiny Walton, deceased, at the January, 1955, term of the District Court of Pontotoc County, State of Oklahoma, and on the 9th day of March, 1955, recovered a judgment and decision by the consideration of said court against the said plaintiffs in error in a certain action or proceeding then pending in said court, being case numbered 21,055 in said district court, entitled, 'In the Matter of the Estate of Liesiny Walton, deceased', wherein the said plaintiffs in error were appellants and the said defendant in error was appellee, on appeal from a judgment and order of the County Court of Pontotoc County, Oklahoma, in proceedings for distribution of

the estate of Liesiny Walton, deceased, which judgment of said District Court herein appealed from, affirmed the said judgment of the County Court of Pontotoc County, Oklahoma, approving the final report of Houston B. Mount, executor of the estate of Liesiny Walton, a deceased full-blood Chickasaw Indian, duly enrolled as such on the final roll of Chickasaw Indians by blood, opposite roll number 777, and ordered distribution of the restricted allotted lands, income therefrom, and other restricted property of the said decedent, in accordance with and pursuant to the terms of a purported will of said deceased which on its face disinherited her three children and one grand-child, her sole heirs at law, the appellants herein, and which said purported will and the execution thereof by said allottee had not been legally acknowledged before and approved by either a United States Commissioner or a County Judge of the State of Oklahoma, as required by the applicable acts of Congress."

It is the contention of the petitioners that the will was void as to restricted property, and that such restricted property should be ordered distributed to the heirs, as if the deceased had died intestate.

Liesiny McLean Walton, a full-blood Chickasaw Indian, duly enrolled as such opposite roll number 777 of the final approved roll of Chickasaw by blood, died while a resident of Pontotoc County, Oklahoma, on February 12, 1949 (C-M. 103). At the time of her death she was the owner of part of her homestead allotment situated in Pontotoc County, Oklahoma, containing 156.72 acres, and such real estate was restricted and tax exempt during her lifetime (C-M. 51, 126, 130, 132, 162). Such real estate was appraised in the probate proceeding at $4,700.00 (C-M.

164). Also there are certain restricted funds on deposit with the Bureau of Indian Affairs, income from said restricted land (C-M. 164).

Houston B. Mount filed a petition for probate of the alleged will in the County Court of Pontotoc County, Oklahoma, on February 17, 1949 (C-M. 136). At that time he produced and filed in said court the purported will (C-M. 99). The deceased left surviving her as her only heirs three children and one grandchild (child of a predeceased daughter), the petitioners herein (C-M. 105).

The will directs the payment of funeral expenses from the estate, and directs that each of the children, Nannie Parnacher, now Johnson, Dave or Devet Parnacher, and Norris or Nonles Parnacher, be given $5.00, and that the granddaughter, Salina Scott, child of Tienie Beans, predeceased daughter, be given $5.00, and purports to devise and bequeath all the rest and residue of the property of the deceased to Houston B. Mount, a white man, of no relation to the deceased (C-M. 100), and directs that said Houston B. Mount be appointed executor without bond (C-M. 100). The will was such as required acknowledgment before and approval by a County Judge of the State of Oklahoma, or a United States Commissioner, in order to be valid as to restricted property, under Section 23 of the Act of Congress of April 26, 1906, 34 Stat. 145, as amended by Section 8 of the Act of Congress of May 27, 1908, 35 Stat. 315. There was attached to the will when it was filed, on a separate sheet, a purported certificate of acknowledgment and approval by Sam J. Goodwin, County Judge of Garvin County, Oklahoma, dated September 18,

1945. The will was dated August 28, 1945. The heirs, petitioners, claim that the purported acknowledgment and approval of the will by the County Judge of Garvin County is void; that the County Judge of Garvin County did not have jurisdiction to approve the will under said Acts of Congress, as the will had been, when executed on August 28, 1945, submitted to Moss Wimbish, the County Judge of Pontotoc County, Oklahoma, for approval and he had refused to approve it; that there was no jurisdiction, thereafter, for the same will to be approved by any other County Judge or United States Commission, after it had been submitted to one such officer who was authorized to approve it or refuse to approve it and he had refused to approve it. The heirs claim, therefore, that the will is void, as to restricted property, and that the purported approval of the will by the County Judge of Garvin County is ineffective and void, and his certificate attached to the will is surplusage, and added no validity to the will.

The heirs filed a contest against the probate of the will (C-M. 140). The County Court of Pontotoc County rendered judgment, on March 11, 1949, refusing to admit the will to probate (C-M. 281). The proponent, Mount, appealed from that judgment to the District Court for trial *de novo,* and the District Court of Pontotoc County, after trial in that court, as to issues in probate of the will, rendered judgment on August 29, 1949, that the County Court be reversed, and directing that the will be admitted to probate (C-M. 158). The District Court of Pontotoc County, Oklahoma, on August 29, 1949, made findings of

fact and conclusions of law (C-M. 149), and in conclusion of law, held:

> "The court concludes that the approval and acknowledgment of the will of a fullblood Indian required by the Act of April 26, 1906, 34 Stat. 137, Sec. 23, as amended by the Act of Congress of May 27, 1908, 35 Stat. 312, Sec. 8, is not an element of the execution and attestation contemplated by the statutes of Oklahoma, and is not within the purview of the jurisdiction of the County Court or this court on appeal in admitting the will to probate" (C-M. 156).

The heirs appealed from the judgment of the District Court of Pontotoc County, Oklahoma (reversing the judgment of the County Court of Pontotoc County, and directing that the will be admitted to probate), to the Supreme Court of Oklahoma, which affirmed the judgment of the District Court of Pontotoc County, directing that the will be admitted to probate. *Parnacher et al.* v. *Mount*, 207 Okla. 275, 248 P.2d 1021. The heirs now contend that such court did not, in its decision on that appeal, conclusively determine the question of the validity of the purported approval of the will or of the will as to restricted property, but in the opinion quoted with approval the rule of *Armstrong* v. *Letty*, 85 Okla. 205, 209 Pac. 168, as follows:

> "The approval and acknowledgment of the will of a full-blood Indian, required by Act Cong. April 26, 1906, sec. 23, as amended by Act Cong. May 27, 1908, sec. 8, is not an element of the execution and attestation contemplated by the statute of Oklahoma and is not within the purview of the jurisdiction of the county court in admitting a will to probate."

Thereafter, pursuant to the mandate of the Supreme Court of Oklahoma, the County Court of Pontotoc County,

Oklahoma, on May 5, 1954 (C-M. 115), made its order admitting the will to probate, and issued letters testamentary to Houston B. Mount, without bond (C-M. 120).

Thereafter, on December 1, 1954, said executor filed his final account and petition for distribution in the County Court (C-M. 3), and the matter was set for hearing in the County Court on December 29, 1954 (C-M. 12), and the heirs filed their objection to the final account and to distribution in accordance with petition of executor and their petition for determination that deceased died intestate as to restricted property (C-M. 14) on December 22, 1954. After trial in the County Court, the County Court, on January 27, 1955, rendered judgment decreeing distribution in accordance with the will, and denying the objections of the heirs, and the heirs perfected appeal from that order for trial *de novo* in the District Court, wherein the matter was tried and decided against the heirs on March 9, 1955, and from that judgment and an order overruling motion for new trial, the heirs appealed to the Supreme Court of Oklahoma.

In the contest against the probate of the will, filed by the heirs in the County Court on February 28, 1949, the heirs, did not plead that the will was void under the federal statute as to restricted property or that the County Judge of Garvin County did not have jurisdiction to approve the will, or that his attempted approval of it was void. The fact that he attempted to approve it was mentioned in the contest in pleading of facts which were intended to show that the will (not the approval) had been obtained by undue influence, and the question now before

the Court as to whether the will was void as to restricted property for lack of valid or effective approval was not an issue under the pleadings in the proceeding for the probate of the will (C-M. 140).

In the objection of the heirs to the final account of executor and to distribution in accordance with the petition of the executor, and petition of the heirs for distribution of restricted property as if deceased had died intestate, it was, in part, stated (C-M. 17):

> "6. The said Houston B. Mount is claiming said real estate and other restricted property by reason of a purported will of said Liesiny McLean then Walton, deceased, dated the 28th day of August, 1945, and protestants allege that said purported will is void as to restricted property, including said real estate above described and other restricted property, for the reason that said purported will was not poperly acknowledged before and approved by an officer having authority or jurisdiction to take such acknowledgment or approve said purported will under the provisions of Section 23 of the Act of Congress of April 26, 1906 (34 Stat. 137), as amended by Section 8 of the Act of Congress of May 27, 1908 (35 Stat. 312).
>
> "7. That the value of said real estate is now and was at the time of the death of said deceased at least the sum of $4,750.00, that being the appraised value thereof, and if said purported will was given complete effect these protestants herein would be disinherited as said purported will purports to direct that each of the protestants be given the sum of $5.00 and that all the rest and residue of the property of said deceased be given to said Houston B. Mount, who is of no relation of said deceased, and said purported will

is void as to restricted property, including said real estate, as it was not properly acknowledged before and approved by an officer who had jurisdiction or authority to approve the same under the provisions of said Acts of Congress.

"8. Protestants allege that on the date of said will, to-wit: the 28th day of August, 1945, Moss Wimbish was the duly elected, qualified and acting County Judge of Pontotoc County, Oklahoma, and said Liesiny McLean then Walton, was a resident of Pontotoc County, Oklahoma; that said purported will was executed on said date in the presence of said County Judge of Pontotoc County, Oklahoma, at his office in the Pontotoc County Courthouse in Ada, Oklahoma, and that at that time there appeared before said County Judge the purported testatrix, Liesiny Walton, the same person as Liesiny McLean, then Walton, and the attesting witnesses of said will, Thomas Puller and Richard F. Colbert, and also, C. L. McArthur, an attorney who had drawn said will pursuant to an agreement with said Houston B. Mount that he would pay said attorney's fees therefor, and the purported will was executed and signed by the witnesses under the supervision of said C. L. McArthur in the presence of said County Judge so that said County Judge could then be informed of all the circumstances surrounding the execution of said purported will, and in order for it to be submitted to him for it to be acknowledged before him and for his action of approval or of refusal to approve the same under said Federal statute; at that time the said C. L. McArthur had attached to said will a sheet of paper containing a form for a certificate of acknowledgment and approval of said will by said County Judge and when the purported will had been executed and signed by the witnesses, said C. L. McArthur then requested said County Judge of Ponto-

toc County to sign such certificate and approve the said will and submitted the same to him for his action of approval or of refusal to approve the same, and after examination by said County Judge of the purported testatrix, through said attesting witnesses as interpreters, she being unable to speak the English language, but only the Chickasaw language, the said County Judge of Pontotoc County, Oklahoma, duly determined in the lawful exercise of the discretion and authority vested in him by said Acts of Congress, in view of all of the circumstances surrounding the execution of said will and the terms and provisions of said will, and the matters which had induced the purported testatrix to permit her thumb mark to be placed thereon (she being unable to write, even her name, or read) in so far as could be ascertained by said County Judge, that said purported will should not be approved, and then refused to approve said purported will, and refused to sign the certificate which said attorney had attached thereto for said County Judge to sign and by such action in refusing to approve said purported will the said County Judge of Pontotoc County, Oklahoma, rendered said purported will void as to restricted property of said Liesiny Walton, deceased, thereupon said C. L. McArthur, acting for and on behalf of said Houston B. Mount, secured the possession of said will, with the blank certificate attached thereto, which showed that said Liesiny Walton had appeared before the County Judge of Pontotoc County at that time, and carried the purported will and attached blank certificate from the office of said County Judge of Pontotoc County, Oklahoma.

"9. Protestants further allege that from that time until the date of the death of said Liesiny McLean then Walton said purported will was in the possession of said attorney, C. L. McArthur, and said Houston B.

Mount, and not any of the protestants had any knowledge thereof prior to the death of said Liesiny McLean then Walton, and that after the date of the death of said Liesiny McLean then Walton and on the 17th day of February, 1949, said purported will was filed in this court together with a petition by said Houston B. Mount for it to be admitted to probate and that when it was filed in this court, the blank certificate which said attorney, C. L. McArthur, had originally had attached to it, showing appearance of said Liesiny Walton before said County Judge of Pontotoc County, Oklahoma, on the 28th day of August, 1945, the date of said will, was not attached to said will, but there was attached thereto on a separate sheet of paper a purported certificate of acknowledgment before and approval of said purported will by the County Judge of Garvin County, Oklahoma, which certificate had been purportedly executed by said County Judge of Garvin County, Oklahoma, on the 18th day of September, 1945, and, protestants allege that after said purported will had been executed in the presence of the County Judge of Pontotoc County, Oklahoma, on the 28th day of August, 1945, and he had been requested to approve it, and he had refused to approve it, said attorney, C. L. McArthur, at the request of said Houston B. Mount, and under an agreement with said Houston B. Mount that he would pay the fee of said attorney therefor, on the 18th day of September, 1945, without any notice to these protestants, the heirs and next of kin of said deceased, took said Liesiny McLean then Walton and said will which the County Judge of Pontotoc County had refused to approve, to Pauls Valley, Oklahoma, and secured the signature of the County Judge of Garvin County, Oklahoma, on the purported certificate of acknowledgment and of approval which was attached to said purported will when it was filed for probate after the

death of said Liesiny McLean then Walton; that upon obtaining the signature of said County Judge of Garvin County, Oklahoma, on said purported certificate which was filed herein with said purported will, or upon being informed by said County Judge of Garvin County, Oklahoma, that he would attempt to approve said purported will and would sign such a certificate, said attorney, C. L. McArthur, detached from said purported will the certificate thereon which he had originally prepared for the use of the County Judge of Pontotoc County, Oklahoma, and substituted therefor and attached to said purported will the purported certificate of acknowledgment and approval of said purported will which was signed by said County Judge of Garvin County, Oklahoma.

"10. These protestants allege that the purported approval of said will by the County Judge of Garvin County, Oklahoma, was void and added no validity to said purported will for the reason that the County Judge of Garvin County, Oklahoma, had no jurisdiction or authority to approve the same, and the purported will which the County Judge of Garvin County attempted to approve was the same will which had been submitted to the County Judge of Pontotoc County, Oklahoma, for his action of approval or of refusal to approve the same, and which said County Judge of Pontotoc County, Oklahoma, had refused to approve on the date of its execution and who, after it had been submitted to him for his action, had exclusive jurisdiction as to said matter as to whether it should have been approved or not."

At the hearing in the District Court of Pontotoc County, Oklahoma, the petitioners offered evidence which was sufficient to prove all of the fact allegations of the objection of the heirs to distribution in accordance with the

petition of the executor, and the petition of the heirs for distribution as if deceased had died intestate, as to restricted property, which facts petitioners contend show that the will is invalid as to restricted property, but most of such evidence was excluded on the ground that the decision of the Supreme Court of Oklahoma on the former appeal was the law of the case, or *res adjudicata* (R. 64-98). Proper offer of the evidence was made, and exceptions taken to the ruling (R. 96).

The evidence which was ordered excluded, or as to which objections were sustained is in the record. Petitioners contend it shows the will was void as to restricted property.

The District Court of Pontotoc County, rendered judgment affirming the order of the County Court approving the final account of executor and directing distribution in accordance with the will, and the Supreme Court of Oklahoma, in its opinion in this case, affirmed such order or judgment, and held that the question presented had been decided against the heirs on the former appeal to that court in the proceeding to probate the will, and that that decision was *res judicata* or the law of the case. But in the opinion, recognized that the Supreme Court of Oklahoma had the power to overrule, or reverse or change its former opinion, saying:

> "In view of the foregoing we must conclude that the opinion in *Parnacher* v. *Mount, supra,* renders the issue presented in this appeal *res judicata.*
>
> "We have also considered contestant's contention that our opinion in that case should be overruled, but

they have made no convincing demonstration that, what we there said and held with reference to said issue, is incorrect or unsound in any respect. We therefore refuse to disturb that opinion.

"The judgment of the trial court is therefore affirmed" (R. 297).

The petitioners could not have expected to have obtained review by certiorari by this Court of the decision of the Supreme Court of Oklahoma, which affirmed the order directing that the will be admitted to probate, which had been made in 1949 (*Parnacher et al.* v. *Mount*, 207 Okla. 275, 248 P.2d 1021), because such court held in that case that the question of the validity of the purported approval of the will under the federal statute was not properly an issue in the proceeding to probate the will, and the question could not be conclusively determined in such proceeding. In the headnotes of such decision in Vol. 248 P.2d at page 1021, it was said:

"Approval of fullblood Indian's will by, and acknowledged thereof before, county judge, as required by federal statute, where will devises realty and disinherits testator's spouse, parent or children, are not elements of execution and attestation contemplated by state statute, nor within purview of county court's jurisdiction in admitting will to probate. Act Cong. April 26, 1906, section 23, 34 Stat. 145, as amended by Act May 27, 1908, section 8, 35 Stat. 315.

"The sole question involved when will is offered to county court for probate is the factum of will, that is, whether it was executed and attested in manner and form required by statutes and whether testator was competent to make will at time of its execution and free from statutory disabilities defeating will."

Obviously, the Supreme Court of Oklahoma, in its opinion on such first appeal, quoted with approval the holding to the effect of the above quotation from the West Publishing Company's staff's headnotes, from the case of *Armstrong* v. *Letty,* 85 Okla. 205, 209 Pac. 168, under which the question as to the validity or invalidity of the will under the federal statute cannot be conclusively determined against the heirs on the probate of the will. Obviously, if it could not be determined by the County Court in such proceeding to probate the will, so as to bar the heirs in a proper proceeding for that purpose from contending the will is void as to restricted property, it could not be so determined by either the State District Court or the State Supreme Court on appeal on the proceeding to probate the will, such courts only having appellate jurisdiction in such proceeding. So, there was not a final conclusive determination of the question involved against the heirs on former appeal to the Supreme Court of Oklahoma, which would have been reviewable by certiorari, and, so, the Supreme Court of Oklahoma putting its holding on the last appeal on the ground, or partly on the ground, that the question was *res judicata,* or settled by the law of the case rule, by reason of the decision on the former appeal, should not now prevent the heirs from obtaining review of the question as to the validity of the will under the federal statute, on this petition, for certiorari.

The petitioners contend that the decision of the United States Court of Appeals for the Tenth Circuit in the case of *Parnacher et al.* v. *Mount,* 207 F.2d 788, was not *res adjudicata* or an estoppel by judgment as to any issue now

before this Court on this appeal, because that decision was not on the merits. Petitioners contend that that court incorrectly held that the matter involved had been conclusively decided against the petitioners by the first paragraph of the syllabus by the court in the former appeal to the Supreme Court of Oklahoma (*Parnacher et al.* v. *Mount*, 207 Okla. 275, 248 P.2d 1021), but that, right or wrong, the decision was not *res adjudicata* or an estoppel by judgment because it was not on the merits, and for that reason prevents the judgment of the Federal District Court which it affirmed from being *res adjudicata* or an estoppel by judgment as to the contention of petitioners herein. No proof, however, as to what was determined in that case is properly in the record in this case.

ARGUMENT

First Proposition

The will of Liesiny Walton, deceased, was void as to restricted property.

We will first, under this proposition, go to the merits of the question. Sufficient evidence was offered by plaintiffs in error to show that the will was void as to restricted property, if such evidence had not been excluded. The depositions of Moss Wimbish (C-M. 167), Sam J. Goodwin (C-M. 182), and C. L. McArthur (C-M. 191), undoubtedly establish the material facts showing that the County Judge of Garvin County did not have jurisdiction to approve this will, and that his purported approval of it was void. Upon determination that such evidence shows the invalidity of such purported approval of the will, it

will follow as a matter of course that the trial court erred in excluding such evidence if it is not determined that any previous decision has conclusively settled the issue against petitioners.

Section 23 of the Act of Congress of April 26, 1906 (34 Stat. 137, 145), as amended by Section 8 of Act of Congress of May 27, 1908 (35 Stat. 312, 315), provides:

> "Every person of lawful age and sound mind may by last will and testament devise and bequeath all of his estate, real and personal, and all interest therein: Provided, that no will of a full-blood Indian devising real estate shall be valid if such last will and testament disinherits the parent, wife, spouse, or children of such full-blood Indian, unless acknowledged before and approved by a judge of the United States court for the Indian Territory, or a United States Commissioner, or a judge of a county court of the State of Oklahoma."

The will in this case was such as required such acknowledgment and approval in order for it to have any validity as to restricted property, as the testatrix was a full-blood Indian and the will attempts to disinherit children. If what the will purports to give to the children ($5.00 each), is less in value than the interest in the restricted property the children would have inherited if testatrix had died intestate, the will required proper acknowledgment and approval in order to be valid as to restricted property. *Coats* v. *Riley*, 154 Okla. 291, 7 P.2d 644.

Of course the children were disinherited, as the interest each of them would have inherited in the restricted land, if there was no will, was of greater value than the

sum of $5.00 the will purports to give to each of them, such land being appraised at $4,700.00 (C-M. 164). If the will was void as to the children because it disinherited them, it was also void as to the grandchild, who inherits one-fourth of the restricted estate if the will is void as to restricted property. *Lauderdale* v. *Tookolo*, 114 Okla. 187, 245 Pac. 587.

THE ACT OF APPROVING OR REFUSING TO APPROVE A WILL UNDER THE FEDERAL STATUTE IS NOT MERELY A MINISTERIAL ACT, BUT IS A JUDICIAL OR QUASI-JUDICIAL ACT.

It is not a perfunctory matter or a mere matter of form but the act of approval or refusal to approve such a will involves the exercise of discretion, as is shown by the opinion of the Supreme Court of the United States in the case of *Davis* v. *Williford*, 271 U.S. 484, 46 Sup. Ct. 547, 70 L. Ed. 1048, affirming the decision of the Supreme Court of Oklahoma in *Williford* v. *Davis*, 106 Okla. 208, 232 Pac. 828, and as is shown by the opinion in *Anglin* v. *Patterson*, 121 Okla. 106, 248 Pac. 632. The statute requires both an acknowledgment and an approval of the will (by the same officer), which are two separate things. The act of taking the acknowledgment may be ministerial, but the act of approving or refusing to approve the will is not merely a ministerial act but is a judicial or quasi judicial act calling for the exercise of discretion, and the authority to approve carries with it the authority to refuse an approval.

In *Fuller* v. *Board of University and School Lands of State of North Dakota*, 129 N.W. 1029, 1032, 21 N.D. 212, it was held:

> "The very act of 'approval' imports the act of passing judgment, the use of discretion, and the determination as a deduction therefrom unless limited by the context of the statute." (See 3 Words and Phrases 831.)

In *Melton* v. *Cherokee Oil & Gas Co.*, 67 Okla. 247, 253, 170 Pac. 691, 697, the same is held, and that:

> "The act of approval 'imports the act of passing judgment, the use of discretion, and the determination as a deduction therefrom'; to confirm, ratify, sanction, or consent to some act or thing done by another, * * *."

and that:

> "Official action, the result of judgment or discretion, is a judicial act."

What Is a Ministerial Act?

In 50 C.J.S., at page 561, under heading, "Judicial", it is said:

> "The distinction between ministerial, judicial, and other official acts, seems to be that, where the law prescribes and defines the duty to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment the act is ministerial; but, where the act to be done involves the exercise of discretion or judgment in determining whether the duty exists, it is not to be deemed merely ministerial * * *."

At page 562, it is said:

"Quasi Judicial. The term is used in a sense at least analogous to that of the word 'judicial' * * *. In a general sense it is used to indicate an exercise of judgment or discretion or the choice of alternatives; and is particularly applied to acts, duties, or functions which require the exercise of discretion or judgment by officers or agencies other than those which strictly constitute a part of the judiciary, and specifically those officers or agencies which constitute the administrative or executive branch of the goverment. * * * The more accurate term 'quasi judicial' is employed to describe governmental officers, boards, or agencies which, while not a part of the judiciary, exercise functions of a judicial nature; and so, where a non-judicial officer has the authority to hear and determine the rights of persons or property, or *the propriety of doing an act, or where a power vests in a judgment or discretion*, so that it is of a judicial character or nature, but does not involve the exercise of the functions of a judge, or where it is conferred on an officer having no authority of a judicial character, the expression used is generally 'quasi judicial'."

Undoubtedly, a County Judge or a United States Commissioner, when determining whether to approve such a will, under said federal statute, and in approving or refusing to approve such a will, is acting as an administrative agent of the Federal Government, and it is clear that the act invloves the exercise of discretion and is more than a mere ministerial act, and is a judicial or quasi-judicial act, for the Supreme Court of the United States in the case of *Davis* v. *Williford*, 271 U.S. 484, 46 Sup. Ct. 547, 70 L. Ed. 1048, *supra*, in construing said federal statute, and in stat-

ing the duties of an officer thereunder and laying down rules for the guidance of such officers acting thereunder, said:

> "It is clear that it was intended by this proviso to prevent a full-blood Indian from being overreached and imposed upon, and induced for an inadequate consideration or by trickery, to deprive his heirs of their inheritance; and that, to this end, a will devising his land to other persons should not be valid unless acknowledged before and approved by a judicial or quasi judicial officer of the United States. *To make certain of this, the officer was not to approve the will unless* the testator appeared before him in person and acknowledged its due execution, and, upon the examination of the testator, *the will appeared to be of such character and based upon such consideration as to warrant its approval.* Plainly, it was not intended that such acknowledgment and approval should be a perfunctory matter."

In discussing the meaning of the proviso in the section, the Supreme Court of Oklahoma in *Anglin* v. *Patterson*, 121 Okla. 106, 248 Pac. 632, *supra*, said:

> "Thus it appears that before such will is valid there must be two distinct acts upon the part of the officer designated by Congress, before whom such person appears to execute such a will. The first act required is that the will be acknowledged before such officer. It then requires that the will be approved by such officer. It was clearly the intention of Congress that only certain classes of officers be given the authority before whom such a will might be acknowledged and approved. And from this act we further conclude that it was the intention of Congress that such officers should so be informed of the acts and circumstances

surrounding the execution of said will that the execution might then be submitted to them for their approval, or *if the facts justified it, to refuse an approval.*"

In keeping with the directions of that case, the will was executed before the County Judge of Pontotoc County, so that he could be informed of the acts and circumstances surrounding the execution of the will, so that he could properly determine whether the will should be approved. Mr. McArthur, who was supervising the execution of the will, then, as soon as it was executed, submitted it to the County Judge of Pontotoc County for his action; requested him to sign the certificate (C-M. 207) attached to will, which would show acknowledgment and approval, and such County Judge refused to sign such certificate because he would not approve the will, and refused to approve the will (C-M. 204). Sometimes there is a separate certificate of acknowledgment and a separate certificate of approval for such a will. (A separate certificate of approval of a will is set out in the opinion in *Parnacher* v. *Hawkins*, 203 Okla. 387, 222 P.2d 362.) It is required that both the fact of acknowledgment and the fact of approval be certified in writing by the officer on the will. *Davis* v. *Williford*, *supra*. In this case, the form of certificate which the County Judge of Pontotoc County was asked to sign, and which he refused to sign, because he refused to approve the will, was one of both acknowledgment and approval, the form of which had been approved in *Proctor* v. *Harrison*, 34 Okla. 181, 125 Pac. 479, and which is quoted in opinion of the Supreme Court of Oklahoma in *Williford* v. *Davis*,

supra. The federal statute requires both the affirmative acts of acknowledgment before and approval by the officer to whom the will is submitted for approval.

It requires that, under the terms of the statute, as to any particular will which is required to be approved under the statute to be valid as to restricted property. So, this same will could not be used to submit to another County Judge for approval, after it was submitted to the County Judge of Pontotoc County and he refused to approve it. He properly exercised his discretion in the matter and refused to approve it and, so, it was void as to restricted property, as no other County Judge had jurisdiction of the matter, thereafter, as to whether this same will should have been approved or not. Granting that there is no specific provision as to venue in the statute, it may be that the County Judge of Garvin County would have had jurisdiction to approve the alleged will if it had not already been submitted to the County Judge of Pontotoc County for approval or refusal of approval, and he had refused to approve it. It may not be strictly a question of whether the County Judge of Pontotoc County, in refusing to approve the will rendered the question as to whether it should be approved *res judicata* (42 Am. Jur., Public Admin. Law, Sec. 161), but it is a question of jurisdiction (73 C.J.S., Public Adm. Bodies, Sec. 53). Administrative determinations made without jurisdiction are void, even if the question arises in a collateral proceeding (42 Am. Jur., Public Adm. Law, Secs. 109, 157, 159; 73 C.J.S., Public Adm. Bodies, Secs. 66, 146).

Did the County Judge of Garvin County Have Jurisdiction?

The answer is found in Section 53 of Title, Public Administrative Bodies and Procedure, in Volume 73, C.J.S., where it is said:

> "The powers and duties of particular administrative officers and agencies as against other officers and agencies are determined by the organic and statutory provisions which grant them their powers and define their duties; and *where they have concurrent powers or coordinate jurisdiction, the one which first acquires jurisdiction over a particular matter has exclusive jurisdiction thereof.*"

Under this rule, the County Judge of Garvin County had no jurisdiction or authority to approve the purported will in this case, and his action in attempting to do so, was void, and such will had already been, in effect, adjudged invalid and rendered inoperative as to restricted lands and property of Liesiny Walton by the action of the County Judge of Pontotoc County in refusing to approve it when it was submitted to him for his action of approval. If a new will had been executed, it might have been a different situation.

In 73 C.J.S., Public Administrative Bodies and Procedure, Sec. 53, at page 376, it is said:

> "Administrative agencies which first acquire jurisdiction over a particular subject matter ordinarily have exclusive jurisdiction thereof as against an official, agency, or body with concurrent power or coordinate jurisdiction, and no coordinate body or official, has any right to interfere therewith."

This is always true as to the exercise of a discretion as to whether to approve an act; where the determination or act to be done by the administrative officer or body is a judicial or quasi-judicial act, and not a mere ministerial duty. This rule is necessary in order to give force and effect to the statute, and for it to serve its purposes.

Under the authorities cited in 73 C.J.S., Sec. 53, p. 376, note 79, following the last quoted statement, the will is void as to restricted property. If this was not the rule, an intolerable situation would be created, and the purposes and objects of the federal statute, which are stated in *Davis* v. *Williford, supra,* would be circumvented, and the statute rendered inoperative and of practically no protection to the parties for whose benefit and protection it was enacted.

Under said note 79 at page 376, of 73 C.J.S., *supra,* and in the pocket part to the volume, the following authorities are cited in support of the text above quoted:

Alabama Electric Cooperative v. *Alabama Power Co.,* 251 Ala. 190, 36 So.2d 523; *Trumbull County Board of Education* v. *State,* 122 Ohio St. 247, 171 N.E. 241; *London Independent School Dist.* v. *Thomerson* (Tex. Civ. App.), 223 S.W.2d 314; *Terminix Co.* v. *Contractors' State License Board of Department of Professional and Vocational Standards,* 84 Cal. App.2d 167, 190 P.2d 24; *State ex rel Corder School Dist.* v. *Oetting* (Mo. App.), 245 S.W.2d 157; *Reitz* v. *Morr,* 107 N.E.2d 113, 158 Ohio St. 180.

In the case of *Alabama Electric Cooperative, Inc., et al.* v. *Alabama Power Co., supra,* a statute was involved, which said:

"No bonds or other evidences of indebtedness of * * * any electric membership corporation * * * shall be issued or sold until the consent to the issuance and sale thereof shall have been given by the department of finance, to be evidenced by the written *approval* of the Director of Finance or the Chief of the Division of Local Finance * * *."

The question as to whether certain evidence of indebtedness of the Alabama Electric Cooperative, Inc., should be issued was submitted to the Chief of the Division of Local Finance who made an order that the consent of the department for the issuance of the notes be denied. Thereafter the Director of Finance rendered a decision authorizing the Alabama Electric Cooperative, Inc., to issue the notes and thereby attempted to overrule the decision of the Chief of the Division of Local Finance and it was held that he had no authority to take such action; that under the statute above quoted, the Chief of the Division of Local Finance had concurrent authority with the Director of Finance to make an order on the application either denying it or granting it and when it had been submitted to the Chief of the Division of Local Finance and he had refused to give approval, that, thereafter, the Director of Finance had no jurisdiction to pass on the matter and determine whether or not the Chief of the Division of Local Finance had erred in his conclusion. In the opinion of the Court, it was said:

"The matter is one of jurisdiction * * *."

In *State ex rel Corder School Dist.* v. *Oetting, supra,* it was held:

"When several separate authorities have concurrent jurisdiction of same subject matter, the one in which proceedings were first commenced has exclusive jurisdiction to end of controversy."

The question as to whether this particular will should be approved was first submitted to the County Judge of Pontotoc County, Oklahoma, who, upon due consideration of the facts and circumstances involved, refused to approve it. Since this particular question as to this will had been so decided by an officer having power to approve it or refuse to approve it, the County Judge of Garvin County did not thereafter have jurisdiction of the matter as to whether this will should be approved.

The proviso, as it first appeared in Section 23 of the Act of April 26, 1906, was as follows:

"Provided, that no will of a full-blood Indian devising real estate shall be valid, if such last will and testament disinherits the parent, wife, spouse, or children of such full-blood Indian, unless acknowledged before and approved by a judge of the United States Court for the Indian Territory, or a United States Commissioner."

It was amended by Section 8 of the Act of May 27, 1908, by adding at the end thereof, the words:

"or a judge of a county court of the State of Oklahoma."

The office of Judge of the United States Court for the Indian Territory ceased to exist upon the advent of statehood, November 16, 1907, but that part of the Act authorizing approval of such a will by a judge of the United States

Court for the Indian Territory was left in the statute by the amendment in the Act of 1908, probably, for the reason that there may have been some wills approved by such a judge before the office was abolished, which might have later, after death of the respective testators, been offered for probate, after the Act of 1908 became effective. We do not think that it was intended that any United States Judge in Oklahoma might now approve such a will under such statute. The reason, probably, that there was no specific provision as to venue in such statute was that a testator might be away from home or from the county of his residence, when deciding to make a will.

It was not necessary that Moss Wimbish, the County Judge of Pontotoc County, write on the will that he refused to approve it, in order for it to be invalid as to restricted property, or that he make any record of his refusal to approve the will, in order for it to be shown that it was first submitted to him for approval and that he first acquired jurisdiction of the matter as to whether it should be approved, and so, had exclusive jurisdiction thereof. In 73 C.J.S., Title, Administrative Agencies and Procedure, at Sec. 227, it is said:

> "All questions of the jurisdiction, power, or authority of an administrative agency to make an order or decision which it undertook to make are open to judicial inquiry and determination. The court is not bound or concluded by the agency's finding of jurisdictional facts, but may examine and weigh all the evidence concerning such facts and make therefrom its own independent findings."

The question is one of construction of a federal statute and the statute should be construed in the light of what was said regarding its purpose in the opinion of the Supreme Court of the United States in *Davis* v. *Williford, supra,* and the following rules of construction found in 82 C.J.S., Title, Statutes, Secs. 323 and 325, are applicable:

> "§ 323. Construction to Effect Legislative Purpose.
> "In construing a statute, the court must look to the object to be accomplished, the evils and mischief sought to be remedied, or the purpose to be subserved, and place on it a reasonable or liberal construction which will best effect its purpose rather than one which will defeat it.
>
> "If a statute is susceptible of more than one construction, it must be given that which will best effect its purpose rather than one which would defeat it, even though such construction is not within the strict literal interpretation of the statute, according to the decisions on the question and even though both constructions are equally reasonable.
>
> "§ 325 * * * In pursuance of the general object of giving effect to the intention of the legislature, the courts are not controlled by the literal meaning of the language of the statute, but the spirit or intention of the law prevails over the letter thereof, it being generally recognized that whatever is within the spirit of the statute is within the statute although it is not within the letter thereof, while that which is within the letter, although not within the spirit, is not within the statute. Effect will be given the real intention even though contrary to the letter of the law.
>
> "The rule of construction according to the spirit of the law is especially applicable where adherence to the letter would result in absurdity or injustice, or

where adherence to the letter of the law would lead to contradictions, or defeat the plain purpose of the act, * * *."

For applicable rules of statutory construction, see, also: *Harper* v. *Victor* (8th Cir.), 212 Fed. 903, 129 C.C.A. 423; *Darby-Lynde Co.* v. *Alexander* (10th Cir.), 51 F.2d 56; *Federal Land Bank* v. *Howell* (10th Cir.), 123 F.2d 50; *Lewis* v. *Moore* (10th Cir.), 199 F.2d 745, 749; 59 C.J. 961 *et seq.*

To hold this will valid as to restricted property would completely defeat the purpose of the federal law and render it of no protection whatever to the parties for whose benefit it was enacted. If this will was held valid, as to restricted property, the policy of the Federal Government in providing for the protective device of approval of an administrative authority for such a will would be frustrated, and the statute rendered ineffectual, and any officer to whom such a will was submitted for approval could not follow the directions of the Supreme Court of the United States in the case of *Davis* v. *Williford, supra,* with any effect, and parties who were wrongfully attempting to obtain a will to restricted land which was without adequate consideration disinheriting the heirs could go to all of the County Judges in Oklahoma, and, although the approval of the will was refused by all of them but one, induce the last one to approve it, and determine that all of those who had refused to approve it had erred, or to go to every United States Commissioner in the United States seeking an approval of the same will, after being refused an approval of it by every County Judge in the State of Oklahoma. It is

quite clear that Congress never intended any such absurdity by this statute. We ask for a construction of the statute which would give it effect and life, rather than one which would defeat its purpose and destroy it.

In *Harper* v. *Victor* (8th Cir.), *supra*, it was held:

> "The reason of the law as indicated by its general terms should prevail over its letter when the plain purpose of the act will be defeated by strict adherence to its verbiage."

In *Darby-Lynde Co.* v. *Alexander*, and in *Federal Land Bank* v. *Howell, supra*, it was held:

> "A statute should receive a rational construction, one that tends to avoid or remove the mischief at which it was leveled, rather than one which promotes or permits the evil and avoids the accomplishment of the purpose of its enactment."

There was an acknowledgment of the will before the County Judge of Pontotoc County, when the will was executed (C-M. 204). Such County Judge of Pontotoc County then had submitted to him the question of whether the will should be approved and refused to approve it. That is admitted in the testimony of C. L. McArthur, attorney for respondent herein (C-M. 204). So, it should be quite clear, it seems to us, under the authorities above cited, that the County Judge of Pontotoc County had exclusive jurisdiction of the question as to whether this will should be approved, and the submission of it to him for approval, when it was acknowledged before him, vested him with exclusive jurisdiction to determine whether it

should be approved, and when he, in the exercise of the lawful discretion vested in him, refused to approve it, that exhausted the jurisdiction to obtain an approval of this particular will by any County Judge or United States Commissioner, and the County Judge of Garvin County did not have jurisdiction to thereafter approve such same will. and his attempted approval thereof is void, and his certificate of acknowledgment and approval, attached to the will, is a nullity, and the effectiveness of such will is to be measured as if such certificate was not on it.

Second Proposition

The Supreme Court of Oklahoma could have held that the former decision of that Court was not a binding determination of the question presented, and the ground of the decision of the Supreme Court of Oklahoma on the last appeal should not prevent determination herein on certiorari of the federal question presented.

Under the decisions of this Court in *Gant* v. *Oklahoma City*, 289 U.S. 98, 53 Sup. Ct. 530, 77 L. Ed. 1058, and *Coe* v. *Armour Fertilizer Works*, 237 U.S. 413, 35 Sup. Ct. 625, 59 L. Ed. 1027, the federal question relied on, and stated in the first proposition of the argument in this petition, cannot be said not to have been open for consideration in the Supreme Court of Oklahoma because of the prior decision in the same case by such court. Under the law as stated in the opinion in the first appeal to the Supreme Court of Oklahoma (*Parnacher* v. *Mount*, 207 Okla. 275, 248 P.2d 1022), the question was not properly before that court then for determination, it not being an issue to be determined upon probate of the will. As above shown, the

Supreme Court of Oklahoma, in the decision of which review is sought, did concede that it could reverse the former opinion, and expressed an opinion on the merits. In *Coe* v. *Armour Fertilizer Works, supra,* it was held:

> "The Federal question relied upon to sustain the appellate jurisdiction of the Federal Supreme Court over a state court cannot be said not to have been open for discussion or consideration in the state court of last resort because of a prior decision in the same case, which was the law of the case, where that court did consider that question when the case came before it for the second time, * * *."

Any decision of the point involved in the former appeal to the Supreme Court of Oklahoma was only on an interlocutory order and not a final determination of the question. As to any decision of the Supreme Court of Oklahoma, petitioners by this petition, therefore,

> "have invoked the jurisdiction of this court at the first opportunity open to them, and the federal question, having been considered by the state supreme court, is properly here" (*Gant* v. *Oklahoma City, supra*).

When in the former appeal to the Supreme Court of Oklahoma, it was held that the contention of petitioners that the will was invalid under the federal statute was not a proper issue for determination in the case at that time, in the proceeding for probate of the will, that rendered any decision by that court of the merits of the question inconclusive. 50 C.J.S., Judgments, Sec. 731, p. 222. See, *U. S.* v. *Ash Sheep Co.* (9th Cir.), 250 Fed. 592; and *Ash Sheep Co.* v. *U. S.*, 252 U.S. 159, 40 Sup. Ct. 241, 64 L. Ed. 507, affirming same.

The decision in the former appeal to the Supreme Court of Oklahoma was not conclusive as to the question now presented because the question was not properly before that court for decision at that time, as that court then held. *In re Hicks Estate*, 189 Okla. 310, 116 P.2d 905. If it had been intended on the decision in the former appeal to the Supreme Court of Oklahoma, to make the purported determination of the point conclusive as to the issues presented on the latter appeal, it would have been necessary that a long line of decisions from *Armstrong* v. *Letty*, 85 Okla. 205, 209 Pac. 168, to *Phillips* v. *Smith*, 186 Okla. 636, 100 P.2d 249, holding that the question cannot be conclusively determined on the probate of the will, be overruled. Instead of that, however, the holding in *Armstrong* v. *Letty* was quoted with approval, in the opinion on the first appeal.

The Supreme Court of Oklahoma could have, in this case, refused to follow the purported determination of the question on the former appeal, and should have refused to follow the same. *Carter Oil Co.* v. *Eli*, 164 Okla. 273, 23 P.2d 985; *George* v. *Connecticut Fire Ins. Co.*, 84 Okla. 172, 200 Pac. 544, 691, 201 Pac. 510, 513, 23 A.L.R. 80; *Cowokochee* v. *Chapman*, 90 Okla. 121, 215 Pac. 759.

A copy of the opinion of the Supreme Court of Oklahoma on the first appeal is included in the appendix hereto as Exhibit "B."

Third Proposition

The decision of the United States Court of Appeals for the Tenth Circuit in the case of *Parnacher et al.* v. *Mount*, 207 F.2d 788, was not res adjudicata or an estoppel by judgment as to any issue now before this Court on this appeal.

The merits of the federal question presented were not decided against the heirs in that opinion.

An adjudication that a question had already been conclusively adjudicated in a prior suit between the parties is not *res adjudicata* in a subsequent suit between the same parties because the merits of the question are not passed on. (50 C.J.S., Judgments, Sec. 696, p. 152; *Phoenix Finance Corporation* v. *Iowa-Wisconsin Bridge Co.* [Iowa], 20 N.W.2d 157.)

The fact that this Court denied certiorari in that case (*Parnacher et al.* v. *Mount*, 347 U.S. 917, 74 Sup. Ct. 515, 98 L. Ed. 1073), was, as we understand the rule, not any expression on the merits as to whether the will was valid as to restricted property, or as to whether the Court of Appeals for the Tenth Circuit was right in holding that the former opinion of the Supreme Court of Oklahoma (*Parnacher et al.* v. *Mount*, 207 Okla. 275, 248 P.2d 1021), was *res adjudicata* of the question.

Any decision of the Federal District Court which the Court of Appeals affirmed is not shown to be *res adjudicata* of the question presented herein, and cannot be, as its grounds for denial of relief to the plaintiffs in that case were supplanted by the reasons given in the opinion of the Court of Appeals for affirmance of the judgment.

Moran Towing & Transportation Co., Inc. v. *Navigazione Libera Triestina, S.A.* (C.C.A.2d), 92 Fed. 37, 40; *Reighley* v. *Continental Illinois Nat. Bank & Trust Co. of Chicago,* 323 Ill. App. 479, 56 N.E.2d 328; *Whittemore* v. *Selectmen of Falmouth* (Mass.), 22 N.E.2d 664.

Under such decision of the United States Court of Appeals in *Parnacher et al.* v. *Mount, supra,* the matter was left in the hands of the State Courts of Oklahoma, and the Supreme Court of Oklahoma, had power, as it recognized, in this last appeal to it to reverse or overrule its former decision on the merits of the federal question presented as to the validity of the will as to restricted property.

Fourth Proposition

The Supreme Court of Oklahoma erred in not holding that the District Court of Pontotoc County, Oklahoma, had erred in refusing and ruling out legal and competent evidence offered by petitioners to show the invalidity of the will under the federal statute, and to establish that the final account of executor could not be allowed.

All of this follows from the foregoing.

Petitioners believe that the federal question presented herein can be decided by this Court, in this proceeding, on this petition, and that the decision of the Supreme Court of Oklahoma of which review is sought may be reversed.

CONCLUSION

This case presents an important question of federal law (proper construction of Section 23 of Act of Congress of April 26, 1906, 34 Stat. 137, 145, as amended by Section 8 of Act of May 27, 1908, 35 Stat. 312, 315, as applied to the fact of this case), which, we submit, should be decided and settled by this Court in this case.

Wherefore petitioners pray that the writ of certiorari be granted to review said decision of the Supreme Court of Oklahoma, and that said judgment and decision of the Supreme Court of the State of Oklahoma be reversed by this Honorable Court, and that petitioners be restored to all rights they have lost by reason thereof.

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